

BEFORE THE  
**Federal Communications Commission**  
WASHINGTON, D.C.

**ORIGINAL**  
**RECEIVED**  
OCT 13 1995

**FEDERAL COMMUNICATIONS COMMISSION**  
**OFFICE OF SECRETARY**

In the Matter of	)	IB Docket No. <u>95-91</u>
	)	GEN Docket No. 90-357
	)	RM No. 8610
Establishment of Rules and Policies for the	)	PP-24
Digital Audio Radio Satellite Service in the	)	PP-86
2310-2360 MHz Frequency Band	)	PP-87

DOCKET FILE COPY ORIGINAL

**REPLY COMMENTS OF**  
**AMERICAN MOBILE RADIO CORPORATION**

AMERICAN MOBILE RADIO CORP.

Bruce D. Jacobs  
Scott R. Flick  
Fisher Wayland Cooper Leader  
& Zaragoza L.L.P.  
2001 Pennsylvania Avenue, N.W.  
Suite 400  
Washington, D.C. 20006

Lon C. Levin  
Vice President  
American Mobile Radio Corp.  
10802 Parkridge Boulevard  
Reston, Virginia 22091

Its Attorneys

Date: October 13, 1995

No. of Copies rec'd 1946  
List ABCDE

## SUMMARY

An examination of the many comments filed in this proceeding makes clear that the public wants DARS, and that the only opposition to DARS comes from broadcasters who feel that DARS will create excessive competition. Opponents of DARS have not, however, met their burden under the Communications Act to demonstrate that DARS is inconsistent with the public interest. In particular, they have failed to demonstrate that DARS will significantly reduce radio listening and revenues such that the local programming efforts of broadcasters will be seriously affected. Lacking such a showing, the Commission should heed the calls of the public and commence DARS licensing.

In its comments, American Mobile Radio Corporation ("AMRC") presented both the legal and policy reasons for licensing the existing four DARS applicants to operate DARS systems using respective 12.5 MHz segments of the allocated DARS spectrum. It also demonstrated that no additional applications should be accepted, and that an auction to assign DARS spectrum would be improper. No commenter in this proceeding has effectively refuted AMRC's comments in this regard.

With regard to service rules, AMRC continues to urge the Commission to allow DARS licensees significant flexibility to adapt to the developing DARS market, and asks that the Commission reject the numerous suggestions by DARS opponents for restrictive service rules that are aimed not at making DARS a better service, but at making it economically unfeasible.

TABLE OF CONTENTS

	<u>Page</u>
SUMMARY .....	i
Overview of Comments .....	2
I. Opponents of DARS Have Failed to Meet Their Burden Under Section 7 of the Communications Act to Demonstrate That the Licensing of DARS Is Contrary to the Public Interest .....	4
A. AMRC Agrees With NAB's Point 1 ( <i>Localism is good</i> ), But Notes That Increased Audio Diversity Also Has Strong Public Interest Benefits .....	5
B. NAB's Point 2 ( <i>Localism will be reduced if station revenues are significantly reduced</i> ) Fails to Recognize That Competition From a National Programmer Will Actually Encourage Stations to Increase Their Local Programming .....	6
C. NAB's Point 3 ( <i>DARS will significantly reduce station revenues</i> ) Is Based Upon Erroneous Conclusions Drawn From a Flawed Study .....	7
D. Because DARS Will Not Significantly Reduce Radio Revenues, NAB's Points 4 and 5 ( <i>DARS will harm localism</i> and <i>DARS is therefore bad</i> ) Are in Error ....	14
II. No Legally-Sustainable Arguments Have Been Presented for Accepting Additional Applications or Auctioning DARS Spectrum .....	15
III. The Commission Must Refuse the Efforts of DARS Opponents to Create Service Rules That Will Make DARS Technically and Economically Unfeasible .....	18
A. DARS Licensees Must Be Allowed to Choose Their Own Mix of Subscription and Advertising-Supported Services .....	19
B. The Commission Should Not Attempt to Regulate Program Content .....	20
C. Terrestrial Repeaters Should Be Allowed .....	21
IV. The Commission Should Not Grant Any Entity a Right of Carriage on DARS Systems or Set Aside Spectrum for Possible Future Systems .....	22
V. The Commission Should Encourage Creation of a Common Receiver Standard Among the Applicants But Should Not at This Time Attempt to Establish by Regulation a Receiver Standard .....	23
Conclusion .....	23

**RECEIVED**

**OCT 13 1995**

BEFORE THE  
**Federal Communications Commission**

WASHINGTON, D.C.

**FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY**

In the Matter of	)	IB Docket No. 95-91
	)	GEN Docket No. 90-357
	)	RM No. 8610
Establishment of Rules and Policies for the	)	PP-24
Digital Audio Radio Satellite Service in the	)	PP-86
2310-2360 MHz Frequency Band	)	PP-87

**REPLY COMMENTS OF  
AMERICAN MOBILE RADIO CORPORATION**

American Mobile Radio Corporation ("AMRC"), by its attorneys, hereby submits its reply comments in the above-referenced proceeding. AMRC is one of four applicants seeking authorizations to operate systems in the Digital Audio Radio Service ("DARS"). AMRC has therefore reviewed the comments filed in this proceeding quite carefully to discern whether any party was able to present any basis for not licensing the existing four applicants to operate DARS systems. A review of the comments makes clear that opponents of DARS have failed to meet their burden under Section 7 of the Communications Act to demonstrate that the creation of DARS will harm the public interest. Moreover, no sound reason has been presented in any of the comments filed that would support the acceptance of additional applications in violation of the Commission's application cutoff, or that would allow an auction of DARS authorizations to be conducted.

## **Overview of Comments**

1. While the number of comments filed in this proceeding is substantial, they are easy to categorize. First, there are the comments filed by the four pending DARS applicants, who are, not surprisingly, very supportive of DARS and the need to quickly commence licensing the service. In their comments, they point out that the Commission issued a valid cutoff notice and that there is no basis for accepting additional applications, much less for conducting an auction for DARS licenses. The applicants' comments then proceed to make a sincere effort at assisting the Commission in crafting service rules for DARS that will provide this new technology with the flexibility necessary to overcome the tremendous hurdles it faces, both economically and technologically. These comments must be given great credence by the Commission, as they come from the four parties who have the most extensive knowledge of the obstacles that will be faced by a DARS system. Moreover, while the applicants' comments, like all comments, are necessarily self-interested, that interest is the same one the Commission has -- an interest in seeing DARS become a successful public service.

2. The second group of comments comes from equally interested parties -- broadcasters who assert that DARS will harm them competitively. In fact, with the exception of only one or two "friends of broadcasters," every last set of comments opposing DARS came from a broadcaster. While AMRC will discuss below many of the individual reasons raised by broadcasters for opposing DARS, they are all premised on the notion that DARS will "out-compete" broadcasters. That, in and of itself, is a patently insufficient reason to halt the creation of DARS.

3. Moreover, AMRC believes that the broadcasters opposing DARS seriously underestimate their ability to compete with DARS. Part of the reason for this appears to be that

many of the broadcasters that filed comments appear to have been misled as to the true nature of DARS. AMRC notes that there is a great deal of repetition in the “facts” cited in the various broadcasters’ comments, as well as in the arguments made and the remedies requested by broadcasters. It therefore appears that many of these comments were based on “position papers” given to the broadcasters trumpeting the threat of DARS to their operations.<sup>1/</sup> There is nothing wrong with this except that the facts given to these broadcasters were either poorly explained or just plain wrong.

4. For example, many broadcasters that filed comments opposing DARS refer time and again to DARS bringing 50 to 100 new channels into their market, and then compare the harm from those channels to the harm from new channels created by Docket 80-90.<sup>2/</sup> After reading this same argument over and over in these broadcasters’ comments, it becomes clear that many of these commenters do not fully understand that receipt of DARS will require a special receiver and antenna that is not even yet available to the public, much less available for free to anyone who wants one. Similarly, they appear not to understand that in order to receive that oft-cited 50 to 100 channels, listeners will likely have to spend additional money on subscription fees, since many DARS channels will not be free. Both of these factors will significantly reduce the ability of DARS to compete with local radio stations.

---

<sup>1/</sup> See Comments of KZTQ(FM) (“The radio industry’s so-called ‘people in-the-know’ talk to the average broadcaster about ‘what to say’ when addressing [the FCC] on this matter. They suggest ‘talking points’ and technical information ....”).

<sup>2/</sup> See, e.g., Comments of Franklin Communications, Inc.; Comments of Hanson Communications, Inc.; Comments of KWJJ; Comments of Stellar Communications, Inc.; Comments of WAFL-FM/WYUS-AM; Comments of WGYL 93.7 FM; Comments of WHCM; Comments of WTTB 1490 AM

5. Having heard from the applicants, who are of course in favor of DARS, and a number of broadcasters who would prefer not to compete with DARS no matter how slight that competition would be, the Commission also received a plethora of comments from the most relevant parties to this proceeding -- the public itself. In over 60 comments filed by public interest organizations, members of the public, trade associations, and technology companies, the Commission was told repeatedly about the tremendous benefits the public expects to garner from DARS and was urged to move quickly to create this new service. Particularly impressive was the fact that not only did many of these commenters see great public benefits to the service, but many suggested specific educational and other innovative uses for DARS. It is also informative to note that not a single public organization filed comments opposing DARS. There can be no doubt where the public interest lies in this proceeding. The public has made it quite clear that the creation of DARS is in the public interest. AMRC therefore reiterates its request that the Commission make this service available to the public as soon as possible by expeditiously licensing the existing four applicants to each operate within respective 12.5 MHz segments of the allocated DARS spectrum.

**I. Opponents of DARS Have Failed to Meet Their Burden Under Section 7 of the Communications Act to Demonstrate That the Licensing of DARS Is Contrary to the Public Interest**

6. The case presented by the National Association of Broadcasters ("NAB") and other opponents of DARS is fairly simple. The argument is composed of the following points:

- (1) Localism is good;
- (2) Localism will be reduced if station revenues are significantly reduced;
- (3) DARS will significantly reduce station revenues;
- (4) Therefore, DARS will harm localism;

(5) DARS is therefore bad.

AMRC discusses each of these points below.

**A. AMRC Agrees With NAB's Point 1 (*Localism is good*), But Notes That Increased Audio Diversity Also Has Strong Public Interest Benefits**

7. NAB and other opponents of DARS expend significant effort attempting to demonstrate Point 1 -- that localism is good. In doing so, however, they have attacked a straw man since there has been little disagreement that local service does have numerous public interest benefits. Overlooked, however, by these commenters is the fact that a diversity of audio services for the public also has public interest benefits. It was in fact startling to read over and over again in the comments of DARS opponents that the public already has all the audio service it needs.<sup>3/</sup> The fact that so many of the broadcasters opposing DARS complacently feel that the public already has all it could want in audio services demonstrates exactly why DARS is desired by the public. There is a substantial portion of the population that would be incensed to hear that they are being adequately served by existing broadcast choices, particularly those in rural markets.

8. If, as NAB contends, 6, or 15, or 21 audio channels are sufficient to serve the public,<sup>4/</sup> then the Commission must ask itself why cable television system operators find it necessary to provide the public with 50 or more video channels in order to attract subscribers. The dearth of audio diversity available to the public compared to the amount of video diversity is

---

<sup>3/</sup> See, e.g., Comments of Wind River Communications, Inc.; Comments of KIOW; Comments of WWY; Comments of WMMO/WHTQ; Comments of KEYG; Comments of Waller Broadcasting, Inc.; Comments of Fairfield Communications, Inc.; Comments of Stay Tuned Broadcasting Corporation; Comments of WLRW/WIXY; Comments of the Goldman Radio Group; Comments of WAFL-FM/WYUS-AM; Comments of Ruston Broadcasting Co., Inc.; Comments of KGMN-FM; Comments of Lanser Broadcasting; Comments of WIZD.

<sup>4/</sup> See Comments of the National Association of Broadcasters, at 16-18.



even more surprising when it is remembered that the amount of recorded audio material available for broadcast far exceeds the amount of video material available. Nonetheless, the portion of the public interested in audio material that will never be played on the limited number of stations in their community is forced to do without or find non-radio sources of such programming. For these members of the public who have given up on radio, DARS will be an important source of audio programming. It is for this reason that the proponents of DARS have repeatedly stated that it is possible for DARS to be a success without taking away listeners who are satisfied with their local radio service. If, on the other hand, broadcasters are stating that they can only survive by keeping listeners that would immediately go elsewhere if they had any other choice, then broadcasters can hardly claim that the public is being adequately served by current radio service.

9. In short, AMRC agrees that localism is good, but it cannot be denied that diversity is also good. More important than either of these conclusions, however, is the fact that localism and diversity are not mutually exclusive, as is discussed further below.

**B. NAB's Point 2 (*Localism will be reduced if station revenues are significantly reduced*) Fails to Recognize That Competition From a National Programmer Will Actually Encourage Stations to Increase Their Local Programming**

10. The argument that localism will be reduced if station revenues are reduced presumes too much. If the revenues of radio stations were about to be reduced by a non-competitive factor (such as an onerous spectrum fee), it is quite possible that the reduction in revenues would lead to reduced localism (assuming such programming is indeed the worst performer when balancing the local goodwill and ratings created against the expense of its production). Whether or not this is true, however, when revenues are reduced by a non-competitive factor, it is clearly not true when the feared reduction in revenues is caused by competition. Just as the maxim that "when your business can least afford advertising is when

you need to advertise your business” applies in the business world, there is an analogous maxim in radio for localism. If a broadcaster finds that it is losing listeners to a national service like DARS, the broadcaster, being a good competitor, would shift its emphasis from national to local programming. By doing so, the broadcaster would be able to attract the many locally-oriented listeners for which DARS cannot compete.

11. It should also be clear to the Commission that local programming is being held out as a carrot in this proceeding, with the Commission being told over and over that if DARS is authorized, local programming will diminish or disappear altogether. As discussed above, it makes no sense from a competitive standpoint to eliminate local programming in order to compete against non-local programming, particularly when broadcaster after broadcaster has described to the Commission the extent to which the public highly values such programming. Moreover, whether such programming makes sense from a competitive standpoint, broadcast licensees are required to provide local programming, so it is a mystery as to how the Commission can be influenced by threats to eliminate it.

**C. NAB’s Point 3 (*DARS will significantly reduce station revenues*) Is Based Upon Erroneous Conclusions Drawn From a Flawed Study**

12. Because AMRC believes that localism will be enhanced rather than harmed by competition, it also believes that any possibility of reduced radio revenues because of that competition is immaterial to the Commission’s public interest analysis. The NAB, however, places much emphasis on radio revenue reductions that might be caused by DARS, since such revenue reductions are critical to NAB’s theory that localism will be harmed by DARS. AMRC notes, however, that despite the Commission’s request for analytical information on potential lost

listenership and advertising revenues,<sup>5/</sup> the only study on this issue submitted by opponents of DARS is Attachment 5 to NAB's comments, which was prepared by NAB's own Research and Planning Department. Attachment 5 is, unfortunately, an incomplete summary of a flawed polling study, and the information necessary to verify its final conclusion of lost radio revenues is entirely absent, making the study more conclusionary than enlightening. The importance of this study to the opponents of DARS cannot be overstated. Every other analysis of harm to localism submitted in this proceeding is premised on a significant drop in radio listening/revenues, and Attachment 5 is the only study claiming to demonstrate that such a reduction in radio listening will occur. Fortunately, while the information submitted in Attachment 5 is incomplete, it is sufficient to demonstrate that the study is seriously flawed and does not support the conclusions drawn from it by NAB.

13. By way of background, NAB Attachment 5 is a partial summary of a consumer poll conducted to assess consumer acceptance of DARS. The initial results given are that Americans spend, on average, 21 hours per week listening to radio. When asked whether they would be interested in a DARS-type service that was absolutely free to listeners, 48-50% of the respondents indicated that they would be "interested." When asked whether they would be interested if they had to pay a \$5 a month subscription fee, the percentage of respondents that were interested plummeted to 28%. At no point did the questioners ask how many respondents would be interested in DARS if they had to pay several hundred dollars for a DARS receiver, and one can only presume that the percentage of interested respondents would have dropped significantly if respondents had been informed that regardless of whether the service itself was free, the receiver would cost 40 to 80 times the \$5 per month subscription fee that so diminished

---

<sup>5/</sup> Notice of Proposed Rulemaking at Paragraphs 13 & 14.

interest in DARS. Because the poll failed to address receiver costs, and asked only whether respondents were “interested” in the service (as opposed to whether they would sign up for the service), the results are useless for assessing the likely market penetration of DARS.

14. Moreover, the failure to address receiver costs impacted a number of other aspects of the poll. By not discussing with respondents the need to purchase and install special receiving equipment, the questioners allowed the respondents to answer questions regarding their likely use of DARS while under the impression that no more effort or expense was necessary to listen to DARS than to radio.<sup>6/</sup> Because receiver and installation costs are two of the biggest obstacles to consumer acceptance of DARS, the failure of Attachment 5 to even recognize the existence of these factors makes the NAB study useless. Even if, however, the study had been performed correctly, the Commission could not rely on its results since Attachment 5 fails to disclose the complete list of questions asked, or provide the raw data regarding responses to all questions. It is therefore impossible to analyze the stated results with any degree of accuracy, and the Commission has been left with little more than a series of conclusionary assertions.<sup>7/</sup>

---

<sup>6/</sup> It is interesting to note that this is the same error that emerges time and again in the comments of DARS opponents, who have in their analyses treated the advent of DARS as being functionally equivalent to having 50 to 100 new FM stations introduced into their communities overnight. See, e.g., Comments of Zimmer Broadcasting, at 2; Comments of Hanson Communications, Inc., at 1; Comments of Southern Horizons Broadcasting Corp.; Comments of Sonja Simmons (WLOW). By overlooking the need for new receivers to obtain DARS service, these commenters have ignored the single greatest limiting factor in the growth of DARS.

<sup>7/</sup> Even without considering the flaws in the study, the results are difficult to believe. For example, Attachment 5 states that the average respondent would listen to DARS 18.6 hours per week. Attachment 5 does not state, however, whether this is the expected level of listening for a free service, or for a service with a \$5 per month subscription fee. This is an important difference, since the number of non-listeners will greatly dilute the average of those who actually believe they are going to listen to DARS. For example, if the starting premise is that 50% of the public will not listen to DARS even if the service and receiver are free (as NAB’s figures indicate), then the remaining portion of the

15. NAB's Attachment 5 indicates that 20% of respondents would listen to less radio if they had DARS, but fails to disclose the average number of hours by which this 20% of the population would reduce their radio listening. Instead, NAB merely states that is a sufficient amount to reduce radio listening nationwide by 11.6%. The flaw in this conclusion is that it presumes that the entire 20% of Americans that would listen to less radio if given access to DARS will all purchase DARS receivers and pay any other costs, including subscription fees, necessary to receive the service. Given that NAB's study found only 28% of Americans were even "interested" in DARS if it cost \$5 per month, it is difficult to imagine that 20% of the population would be willing to part with hundreds of dollars for a DARS receiver and that the

---

population apparently indicated that they would listen to DARS 37.2 hours per week (in order to achieve the 18.6 hours per week average for the nation as a whole). This is an amazing figure. If accurate, it means that 50% of the U.S. population will spend 5.3 hours per day listening to DARS *every day of the year*. Even more incredible would be if this national average is based not on the listening habits of the 50% of the population that would listen to free DARS, but on the 28% that are interested in DARS with a \$5 per month subscription fee. If this is the case, then those 28% of Americans are going to have to listen to DARS 66.4 hours per week, or *9.5 hours per day*. There is clearly something awry in these results, and this, along with the other problems discussed above, indicate that the NAB's study is unreliable.

Moreover, in order for an individual to listen to the quantity of DARS necessary to achieve the NAB's averages (5.3 to 9.5 hours per day), he or she would require not just one DARS receiver, but several. Since few Americans spend five to nine hours per day in their car, owning a DARS receiver for just their car would not allow them to receive the amount of DARS service necessary to achieve NAB's averages. To meet those averages, listeners would also need to have DARS receivers in their homes and workplaces, thus increasing the amount of consumer investment being ignored in NAB's study from several hundred dollars per person for one receiver, to approximately a thousand dollars per person for multiple receivers. Given that NAB's own study shows that 72% of Americans are not interested in DARS even if it costs only \$5 per month, the number of people who would be willing to spend \$1,000 to be able to access DARS service *throughout* their day has to be very small. It is interesting to note in this regard that despite the popularity of compact disks, only 13% of Americans have CD players in their cars. See Comments of the Consumer Electronics Group of the Electronic Industries Association, at 4.

20% willing to buy a receiver is the exact same 20% who would listen to less radio if they had DARS.<sup>8/</sup>

16. So what does all this mean? It means that the polling results included in NAB Attachment 5 are useless in determining whether radio station revenues will actually be harmed by DARS to the extent claimed by NAB. By taking as a given that Americans will be able to receive DARS without purchasing a receiver or even paying for the service, NAB has presumed 100% market penetration for DARS from the day the satellite is launched. Given that even radio and television have yet to achieve 100% market penetration,<sup>9/</sup> such a presumption is not only unsustainable, but highly deceptive as well.

17. Because of this erroneous assumption, Attachment 5 does not represent a real-world analysis of DARS use, but instead addresses DARS use in an ideal world where DARS service is not only available without any costs, but everyone in America has the capability to receive DARS programming 24 hours-a-day everywhere they go. While such a dream world does not exist, NAB's "ideal world" figures can be used along with real world data to get a decent feel for the maximum impact DARS could have on radio revenues.

---

<sup>8/</sup> Even if, against all odds, this were the case, it is very likely that these respondents overestimated the decrease in their radio listening because they overestimated their access to DARS. For reduced listening by 20% of the population to result in the claimed nationwide drop in radio listening of 11.6%, that portion of the public would have to reduce their radio listening by 58%. Such a significant substitution of DARS for radio would require these listeners to have DARS receivers in almost all the locations that they currently have radios. Thus, in order to get the diminution in radio listening asserted, this 20% of Americans would have to be willing to buy several DARS receivers. NAB has failed to show that listeners will do that.

<sup>9/</sup> Comments of the Consumer Electronics Group of the Electronic Industries Association, at 4.

18. First, NAB has told us that in a world with 100% market penetration by DARS, radio listening would drop 11.6%. Because 100% market penetration is completely unrealistic (even CD players have yet to reach 50% of U.S. households),<sup>10/</sup> a general idea of the real world impact of DARS on radio can be obtained by utilizing a more realistic estimate of market penetration. It should be recognized, however, that even this result will be fairly optimistic, as it will continue to utilize NAB's unrealistic assumption that DARS listeners will have a DARS receiver with them at all times -- in the home, in the car, and in the workplace.

19. While it is difficult to project market penetration for new technologies, estimates for the penetration of DARS over the next ten years have ranged from approximately 3.5% to 10%.<sup>11/</sup> Using this information, two scenarios can be created to assess the *maximum* possible reduction in radio listening that might be caused by DARS:

***Scenario 1 -- DARS listeners are representative of Americans as a whole, and 20% will listen to less radio because of DARS***

20. If we make the assumption that DARS listeners will be a cross-section of America, and we accept NAB's conclusion that universal free access to DARS by 100% of Americans will result in an 11.6% reduction in nationwide radio listening, we can calculate the reduction in radio listening in a real world situation by multiplying actual market penetration projections by 11.6% (the reduction in radio listening that would occur with 100% market penetration). Thus, the reduction in radio listening caused by DARS would be between 0.4% (with 3.5% market penetration) and 1.2% (with 10% market penetration).

---

<sup>10/</sup> Id.

<sup>11/</sup> See Comments of American Mobile Radio Corporation, Appendix A (study by Malarkey-Taylor Associates, Inc./Economic and Management Consultants International, Inc., at 3); Comments of CD Radio Inc., Appendix A (Lilley Study, at 5, 7).

**Scenario 2 -- DARS listeners are representative of only those individuals who indicated an interest in free DARS, and 40% will listen to less radio because of DARS**

21. Scenario 2 assumes that those who sign up for DARS will be representative of the 50% of Americans who expressed an interest in free DARS in NAB's study, and also assumes that the 20% of respondents who indicated that they would listen to less radio if they had DARS is part of this group. Based on these assumptions, we can expect that 40% of DARS listeners ( $20\% \div 50\%$ ) will reduce their radio listening because of DARS. We can therefore calculate the reduction in radio listening in this scenario by multiplying market penetration (stated as a percentage) by 40% (the percentage of DARS listeners that will reduce radio listening because of DARS), dividing the result by 20% (the percentage of Americans whose reduced listening because of DARS would allegedly result in an 11.6% reduction in nationwide radio listening), and then multiplying that result by 11.6% (the amount radio listening would be reduced by if all 20% of those who indicated they would reduce radio listening because of DARS actually listened to DARS).

22. Thus, the calculation for a 3.5% market penetration is  $((3.5\% \times 40\%) \div 20\%) \times 11.6\% = 0.8\%$ . The calculation for a 10% market penetration is  $((10\% \times 40\%) \div 20\%) \times 11.6\% = 2.3\%$ . Therefore, in this scenario the reduction in radio listening resulting from DARS would range between 0.8% (with 3.5% market penetration) and 2.3% (with 10% market penetration).<sup>12/</sup>

---

<sup>12/</sup> While AMRC believes that Scenarios 1 and 2 accurately represent the real world impact of DARS, it is important to note that even in a "worst case" scenario where everyone who signs up for DARS is part of the 20% of Americans who say they will listen to less radio because of DARS, the reduction in radio listening is still far less than the 11.6% cited by NAB. We can calculate the impact on radio listening in such a scenario by dividing the actual market penetration (stated as a percentage) by 20% (the percentage of Americans whose reduced listening because of DARS would allegedly result in an 11.6% reduction in nationwide radio listening), and multiplying the result by 11.6% (the amount radio listening would be reduced if all 20% of those who indicated they would reduce radio listening because of DARS actually listened to DARS). As an example, if 20% of



23. Regardless of whether Scenario 1 or Scenario 2 is the more likely one, the slight reduction in listening (0.4%-2.3%) under either scenario is unlikely to significantly reduce radio revenues, particularly given offsetting growth in the radio industry over the next ten years.<sup>13/</sup> More to the point, it certainly will not, as the NAB claims, force hundreds or thousands of stations to abandon their local programming efforts. Aanalysis of NAB's Attachment 5 makes clear that the studies and anecdotes regarding the demise of local radio that would result from a 10% drop in audience/revenue are not relevant to this proceeding, as no one has been able to show that anything even approximating such a reduction could possibly occur as a result of DARS.

**D. Because DARS Will Not Significantly Reduce Radio Revenues, NAB's Points 4 and 5 (*DARS will harm localism and DARS is therefore bad*) Are in Error**

24. Since even NAB's own study shows that there will be at most an insignificant reduction in radio listening caused by DARS, there is no reason to think that radio revenues will be significantly affected by DARS either.<sup>14/</sup> Thus, there is no reason to believe that radio

---

Americans received DARS service and it was the same 20% that said they would reduce their radio listening because of DARS, the calculation would be  $(20\% \div 20\%) \times 11.6\% = 11.6\%$ . Since, however, real world market penetration levels will be significantly lower than 20% (i.e., 3.5%-10%) the calculations are  $(3.5\% \div 20\%) \times 11.6\% = 2\%$  and  $(10\% \div 20\%) \times 11.6\% = 5.8\%$ . Thus, even in the incredibly unlikely event that every last DARS listener reduces his or her radio listening despite the fact that NAB's study indicates that only 20% of Americans will, the result would still be a reduction in radio listening no greater than 2% (with a 3.5% market penetration) to 5.8% (with a 10% market penetration). Moreover, the calculation herein likely overstates the reduction in radio listening since most DARS listeners will not have the multiple DARS receivers necessary to allow them to substitute DARS for radio at work, at home, and in their car.

<sup>13/</sup> In fact, recent growth in radio industry revenue far exceeds any adverse impact DARS might have on radio. According to the October 9, 1995 issue of Radio Business Report, both local and national radio revenue for 1995 are up 10% over 1994. Id. at 4.

<sup>14/</sup> While some commenting broadcasters express concern that they will lose national advertising to DARS, the relatively low market penetration projected for DARS will

stations will either go off the air or reduce their local programming because of DARS.

Moreover, given that DARS will provide service to many parts of the country that are presently unserved or underserved, as well as provide a diversity of programming currently unavailable to much of the country, the Commission should accept the judgment of the numerous public organizations that have filed in this proceeding proclaiming DARS to be a great public benefit that should be licensed as quickly as possible. Despite the opposition raised by those who would prefer not to compete with this service and who feel that the public has "enough" audio service available to them, it is clear that DARS is not bad, but instead represents a public good that has been held back for far too long. AMRC therefore urges the Commission to move forward and license the existing four DARS applicants as quickly as possible.

**II. No Legally-Sustainable Arguments Have Been Presented for Accepting Additional Applications or Auctioning DARS Spectrum**

25. In its comments, AMRC presented an extensive discussion of both the legal and policy reasons preventing the Commission from negating its 1992 application cut-off notice and auctioning DARS spectrum. The only commenters who opposed licensing the existing entities are:

Those who oppose DARS as a service (who appear to recognize that the delay in implementing DARS that would result from additional applications and/or an auction forestalls DARS competition to radio);

---

greatly limit the ability of DARS to serve as a substitute for radio among national advertisers. Moreover, as a number of commenting broadcasters pointed out, the great majority of their advertising revenue comes from local advertising rather than national advertising. See Comments of Lanser Broadcasting (100% of advertising revenues are local); Comments of Seehafer Broadcasting Corp. (95% of advertising revenues are local); Comments of WMJB (95% of advertising revenues are local). The financial impact of DARS attempting to compete with radio for national advertisers is therefore likely to have little impact on station economics.

The Minority Media and Telecommunications Council (which asserts that new DARS applications should be accepted to allow minority applicants to file, but fails to demonstrate that any such minority applicants were prevented from filing in the original application window, or that any such applicants exist that would now apply if an additional filing opportunity were created; and

Cracker Barrel Old Country Store, Inc. (which, despite the Commission's contemplation of additional applications in the NPRM, is the *only* entity other than the four DARS applicants to express any interest in constructing an entire DARS system, and which has failed to provide any reason why it was unable to file an application in response to the Commission's original cut-off window).

26. An examination of these comments reveals no legal or policy basis for accepting additional applications or licensing less than the full 50 MHz of DARS spectrum to the four DARS applicants. For the most part, these comments say little more than accepting more applications and awarding more licenses will increase DARS competition. That is a fallacious conclusion. NAB, for example, proposes that each DARS licensee receive only 5 MHz of spectrum, arguing that this would allow a minimum of ten competing systems.<sup>15/</sup> The Commission should, however, have no doubts that such a proposal is not based on a desire by broadcasters to compete with more DARS systems, but instead upon a scheme to have the Commission license DARS in a form that is not economically viable, thus preventing any

---

<sup>15/</sup> NAB claims that the use of orthogonal frequency polarization would allow 19 DARS systems to operate simultaneously. Even if, however, there were 19 applicants willing to expend the resources necessary to launch a DARS system using only 5 MHz of bandwidth, it is questionable whether there will be enough geosynchronous orbital slots covering the United States available to handle the 19 to 38 DARS satellites that would exist under such a licensing scheme. Moreover, such polarization techniques are still largely untested in the S-Band, and their availability for use by DARS licensees should not be assumed. It is for this reason that AMRC continues to urge the Commission to license the existing four applicants to each fully utilize 12.5 MHz of DARS spectrum and, to the extent such polarization techniques someday prove feasible, allow them to utilize this technology to expand their program offerings to the public. In this way, the possibility of interference is minimized and the quality of service is maximized, since a DARS licensee would be unlikely to utilize polarization techniques that harm the quality of its existing service.

competition to radio from DARS. As the Commission is aware, satellite systems are a collection of technical tradeoffs between satellite power, number of channels, data rate, link margin, and bandwidth. Given the power limitations of a satellite system, and the need for a robust link margin to minimize service interruptions in the S-Band, it would be impossible to present enough high-quality channels in 5 MHz of spectrum to attract an audience and recover the immense cost of building and launching a DARS system. Also, since only four entities have filed applications, and only one other entity has even expressed interest in launching a DARS satellite, even if all five of these entities tried to make a go of it with 5 MHz licenses, half of the DARS spectrum would lie fallow. Such a result will actually reduce competition and diversity in audio service, and AMRC does not believe it is an accident that the great majority of commenters seeking the acceptance of additional applicants are broadcasters fearful of competition.

27. Ignoring the obvious motive for attempting to assure non-viable DARS systems and minimal use of the DARS spectrum, the comments seeking acceptance of additional applications and the use of spectrum auctions fail to seriously address any of the legal or policy issues raised by AMRC in its comments in this proceeding. AMRC therefore stands by its original comments and maintains that the Commission should grant DARS licenses to the existing four applicants for 12.5 MHz each and abandon the notion of an auction. No mutual exclusivity among applicants exists, and no one has shown that they were unfairly excluded by the Commission's original cut-off notice.

### **III. The Commission Must Refuse the Efforts of DARS Opponents to Create Service Rules That Will Make DARS Technically and Economically Unfeasible**

28. At the outset, AMRC urges the Commission to treat proposals for DARS service rules suggested by DARS opponents with great suspicion. A review of the comments opposed to DARS makes clear that, having recognized that the public interest (and indeed the public itself) is demanding the creation of DARS, the only option available to opponents is to suggest licensing and service rules that will delay the introduction of DARS or make it such a poor business prospect that no systems will ever be launched. For example, a number of commenters are urging the Commission to limit DARS to being a subscription-only service,<sup>16/</sup> while a number of other commenters opposing DARS argue that DARS could never survive as a subscription-only service (and should therefore not be authorized at all).<sup>17/</sup> Sadly, there is no conflict between these two positions, since in the eyes of DARS opponents, “the best DARS system is a dead DARS system.” Thus, many of the suggested service rules are not meant to make DARS better serve the public, but are instead aimed at making operation of a DARS service impossible. A number of these “poison pill” service rule proposals are discussed below.

---

<sup>16/</sup> See, e.g., Comments of the National Association of Broadcasters, at 46-49; Comments of Mt. Wilson FM Broadcasters, Inc., at 7; Comments of Infinity Broadcasting of Detroit, at 2; Comments of Noble Broadcast Group, Inc., at 7; Comments of Bonneville International Corporation, at 4; Comments of Susquehanna Radio Corporation, at 5.

<sup>17/</sup> See, e.g., Comments of Prescott Valley Broadcasting, Co., Inc.; Comments of MyStar Communications Corporation; Comments of KMXZ/KKHG/KKND.

**A. DARS Licensees Must Be Allowed to Choose Their Own Mix of Subscription and Advertising-Supported Services**

29. As outlined in AMRC's comments, it is critical to the development of DARS that a reasonable number of "free" DARS services be available to entice the public into purchasing DARS receivers and thereby encourage the economies of scale necessary to minimize receiver costs. Moreover, such advertiser-supported services can provide an immediate revenue stream to the DARS licensee, whereas building a sizable subscription base could take many years. Without the economies of scale that an advertiser-supported service can provide, potential subscribers must be willing to pay not only for the service, but for a relatively expensive receiver. The desire of consumers to invest in a piece of electronics that requires monthly payments in order to work is understandably limited. If, however, they can invest in a low-cost mass-produced receiver and instantly receive service without any further payments, consumers are far more likely to purchase the receiver and may ultimately subscribe to additional DARS services.

30. Given the incredible expense of building and launching a DARS system, as well as the necessarily uncertain consumer reaction to various service offerings, DARS licensees cannot afford to be restricted to subscription-only status. To create service rules that would prevent such flexibility would artificially limit competition for both advertising and listeners. Arbitrarily restricting DARS licensees to subscription-only service would be akin to creating a service rule that prohibited DARS from providing service to any listener whose last name begins with a consonant -- it would certainly reduce any impact DARS might have on local radio, but would hardly be in the public interest. This effort by broadcasters to limit perceived competition at the expense of the public should be rejected.

**B. The Commission Should Not Attempt to Regulate Program Content**

31. In another effort to drive DARS to a death by regulation, a number of DARS opponents suggest that DARS licensees should be required to air only “niche programming.”<sup>18/</sup> Others went so far as to insist that DARS licensees should be required to make a showing for each proposed channel on their systems that the particular channel is in the public interest and is not redundant with broadcast programming.<sup>19/</sup> Ignoring the horrendous Constitutional issues posed by such government micromanagement of DARS content, attempting to define what constitutes acceptable niche programming would be impossible. For example, in many parts of the DARS service area, jazz would be considered a niche format previously unavailable. In larger cities, jazz stations are often quite common.

32. Moreover, what would be the basis for such a restriction on DARS licensees? Since an important part of the service is to provide audio programming to rural locales that have few or no radio stations, depriving rural listeners of various formats because those formats are already available to city dwellers would make no sense. While AMRC believes that niche programming will be an economically important part of a DARS system, it is unlikely to be the sole form of programming. In fact, many rural residents that have applauded the progress of DARS would be quite upset to learn that DARS will be used to deliver thirty channels of exclusively foreign language programming.

---

<sup>18/</sup> NAB proposes in its comments a periodic “promise versus performance” review requiring DARS licensees to regularly inform the Commission what “ethnic and niche” programming they intend to offer and to demonstrate that they have lived up to past promises regarding the provision of such programming. Comments of the National Association of Broadcasters, at 52-53.

<sup>19/</sup> See Comments of Entertainment Communications, Inc., at 11-12; Comments of WSOC, at 1.

33. Finally, the Commission has to ask itself why broadcasters opposing DARS wish to prevent DARS licensees from having the freedom to provide whatever type of programming the public demands. The answer, once again, is to cripple DARS in its ability to serve the public. When the Commission is being asked to prevent the provision of programming desired by the public, it can be assured that it is private interests, rather than the public interest, that is being promoted.

**C. Terrestrial Repeaters Should Be Allowed**

34. Many DARS opponents have urged the Commission not to allow the use of terrestrial repeaters, arguing that DARS licensees should not be allowed to use repeaters to extend their coverage. Terrestrial repeaters do not, however, extend DARS coverage outside of the system's authorized service area. They merely fill in coverage gaps within the authorized service area caused by various signal obstructions. This is no different than the television boosters and FM boosters used by broadcasters, and it is difficult to justify disparate treatment for DARS systems, particularly where the result is lessened service to the public.<sup>20/</sup> Again, the only reason to prohibit terrestrial repeaters is to reduce the ability of DARS to provide service to the public, and that is not in the public interest.

---

<sup>20/</sup> The lack of consistency in the treatment of broadcasters and the treatment proposed by broadcasters for DARS licensees is a pervasive theme in this proceeding. For example, many broadcasters, including Infinity Broadcasting, argued in their comments that 50% of DARS spectrum should be set aside for broadcasters, but NAB itself stated that the four DARS applicants should not receive the spectrum for which they filed years ago because such a grant would constitute an "enormous spectrum windfall." Comments of the National Association of Broadcasters, at 55.



**IV. The Commission Should Not Grant Any Entity a Right of Carriage on DARS Systems or Set Aside Spectrum for Possible Future Systems**

35. In the comments filed by the Minority Media and Telecommunications Council, the Commission was urged to require each DARS licensee to set aside one channel for commercial minority access, and one channel for noncommercial public access. Similarly, National Public Radio urged a more general right of access to DARS carriage for public radio. While AMRC expects that public radio will have no trouble finding a spot on one or more DARS systems (assuming DARS licensees are given sufficient spectrum to offer a broad diversity of services), AMRC opposes the grant of a guaranteed right of access to any entity. Given that each DARS system will cost between \$400 million and \$600 million just to construct and launch, each channel that is set aside greatly increases the likelihood that the system will not be financially viable, or that the increased rates that must be charged for the remaining channels to make up the difference will be beyond the means of the many program providers that are not given free access. For these economic reasons, as well as the need to allow DARS licensees maximum flexibility to create an attractive program mix that will make DARS viable and hopefully a success, the Commission should resist any urging to limit that programming freedom.

36. In a similar vein, Minnesota Public Radio filed comments asking the Commission to set aside 20% of DARS spectrum for eventual use by public radio. Given, however, that no public radio entity has filed an application to obtain a DARS license, and that the immense costs involved in launching a DARS system make the prospect of a public radio DARS system unlikely, setting aside spectrum for such a speculative system would merely allow spectrum that would otherwise be used to provide DARS service to lie fallow. Because public radio is unlikely to have difficulty in obtaining far more cost-effective DARS carriage on one or more of the